

8-24-2011

# Morris v. State Respondent's Brief Dckt. 38308

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

DARREL WYATT MORRIS,	)	
	)	
Petitioner-Appellant,	)	NO. 38308
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

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**BRIEF OF RESPONDENT**

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APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

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HONORABLE MICHAEL E. WETHERELL  
District Judge

---

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State of Idaho

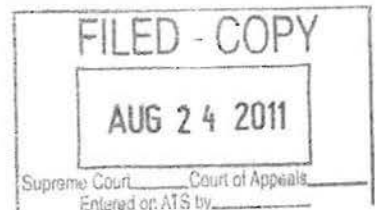
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## STATEMENT OF THE CASE

### Nature Of The Case

Darrell Wyatt Morris appeals from the district court's summary dismissal of his petition for post-conviction relief. Specifically, he challenges the district court's denial of his motion to appoint counsel.

### Statement Of Facts And Course Of Proceedings

The Idaho Court of Appeals described the facts of Morris' underlying convictions:

Morris appeals from the judgments of conviction in two cases that were consolidated for purposes of sentencing. In case number 35541, Morris was charged with eluding a police officer, I.C. § 49-1401(2)(a), and pursuant to a plea agreement, pled guilty to the charge and the state agreed to dismiss a separate case and to remand yet another case as a misdemeanor. While awaiting sentencing on the eluding charge, Morris was charged with and pled guilty to driving under the influence of alcohol (DUI), I.C. §§ 18-8004, 18-8005(5), in case number 35542. The district court sentenced Morris to a unified term of five years, with three years determinate, on the eluding charge and to a consecutive unified term of ten years, with three years determinate, on the DUI. Morris filed an Idaho Criminal Rule 35 motion for reduction of sentence in case number 35542, which the district court denied. Morris appeals from his judgments of conviction and sentences, contending that the district court abused its discretion by failing to consider his mental illness and alternatively by imposing excessive sentences.

State v. Morris, Docket Nos. 35541/35542, 2009 Unpublished Opinion No. 482 (Idaho App., May 29, 2009), pp.1-2. The Court affirmed Morris's convictions and sentences. Id.

Morris timely filed a pro se "Petition and Affidavit for Post Conviction Relief." (R., pp.3-6.) Morris asserted that he received ineffective assistance of

counsel at sentencing, claiming his counsel failed to effectively present mitigating factors and to "object to objectable issues," and also promised Morris that his cases would be transferred to Mental Health Court and he would be placed on probation. (R., pp.4-5.)

The district court denied Morris's motion for counsel and issued notice of its intent to dismiss Morris's petition. (R., pp.16-19.) After setting forth the standard for appointment of post-conviction counsel articulated in Charboneau v. State, 140 Idaho 789, 102 P.3d 1108 (2004), and the standard for evaluating an ineffective assistance of counsel claim as articulated in Strickland v. Washington, 466 U.S. 668 (1984), the district court found that Morris's claims "are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel." (R., p.18.) Specifically, the district court found that Morris had "fail[ed] to describe any such evidence or objections [that counsel failed to present or make]; nor [did] he show how he was prejudiced or how this evidence would have resulted in a different outcome. Petitioner's vague and unsupported statements and incomplete claims do not form the basis for a cognizable claim for post conviction relief." (R., p.17 (internal citations omitted).) The district court gave Morris twenty days "to correct the deficiencies in his claims." (Id.)

Morris's response did not include any affidavits or other admissible evidence. (R., pp.25-32.) Morris did, however, "attempt to expound on his following allegations of ineffective assistance of counsel." (R., p.26.)

Specifically, for purposes of the instant appeal, Morris expounded on his claim that his trial counsel “did not object to objectable issues”:

Counsel did not object to the Court’s Mental Health Evaluation because of the fact it was administered by a Department of Health and Welfare “counselor” during a twenty (20) minute visit at the County Jail, and not a licensed physician.

(R., p.27.) Morris also claimed that his trial counsel did not submit for sentencing “several medical reports and record from the Social Security Administration, All Seasons Mental Health, Intermountain Hospital, and Saint Alphonsus Mental Health Center which ... would [have] contradicted the Court’s Mental Health Evaluation.” (Id.) As to his prejudice, Morris argued “[h]ad this honorable Court known of the Petitioner’s true mental health history, it would [have] had to consider that as well,” and “could have considered treatment and rehabilitation instead of only incarceration.” (Id.)

Upon the state’s motion (R., pp.33-34), the district court issued its “Order Unsealing and Authorizing Release of Presentence Investigation Report and I.C. § 19-2524 Evaluations” (R., pp.35-36). The district court also granted Morris’s “Motion to Unseal and Release All Medical Reports in Cases CR-MD-2008-001589 and CR-FE-2008-0007741,” by which Morris sought the release of his medical records by his trial counsel and which, he claimed, were not provided to the court at sentencing. (R., pp.37-38, 39.)

In the same order by which it granted Morris’s request for the release of his medical records, the district court considered Morris’s response to its previous order denying counsel and notice of intent to dismiss Morris’s petition. (R., pp.39-44 (“Order Denying Counsel and Notice of Intent to Dismiss”).)

The district court addressed Morris's first claim, that his trial counsel failed to provide the sentencing court with his medical records from the Social Security Administration, All Seasons Mental Health, Intermountain Hospital and Saint Alphonsus Mental Health Center. (R., pp.39-40.) The district court reviewed the record below and noted:

[T]he file clearly shows that the Court reviewed multiple mental health related reports, including those listed by the Petitioner, and took them into consideration prior to sentencing, including: Discharge Summary from Vista Del Mar Hospital; Omega Health Services Psychiatric Progress Notes; All Seasons Mental Health Summary and Comprehensive Assessment; Intermountain Hospital Discharge Summary, History and Physical, and Psychiatric Evaluation; Saint Alphonsus Emergency Room Reports, Operative Reports, Patient's Charts, Emergency Mental Health Consultation Report, Radiology Reports, Inpatient Psychosocial Assessment, Inpatient Progress Notes, and Patient Profile Report; Ada County Paramedics Prehospital Patient Care Report; June 19, 2008 Mental Health Report (I.C. § 19-2524); July 16, 2008 Substance Abuse Report (I.C. § 19-2524).

(R., p.40.) Accordingly, the district court found Morris's claim that his trial counsel failed to provide these reports to the sentencing court was "clearly contradicted by the record." (Id.) "As such, the Court finds these allegations remain patently frivolous and fail to warrant the appointment of counsel." (Id.)

The district court then addressed Morris's second claim of ineffective assistance of counsel:

As to allegation two (2), that "counsel did not object to objectable [sic] issues," Petitioner alleges (a) counsel failed to object to the Mental Health Evaluation because it was not administered by a licensed physician; and (b) counsel did not rebut the evaluation with the contradictory medical reports. This second supportive allegation is merely repetitive of Petitioner's first allegation and will not be further addressed. As to the allegation that counsel failed to object to the lack of a physician, this claim remains incomplete. "Effective legal representation does not require that an attorney



object to admissible evidence.” Counsel had no reasonable grounds on which to object. In *Thorgaard v. State*, the petitioner sought relief based on an allegation that the staff psychologist was not qualified to conduct the evaluation. However, [Thorgaard] failed to show any error or inadequacy in the clinician’s report, thus failing to establish his burden of prejudice. Moreover, Petitioner has neither alleged nor shown that the evaluation violated the requirements of I.C. § 19-2524 or similar provisions. ... Accordingly, because this claim ... is clearly contradicted by the record, and because it is facially invalid, this claim remains incomplete and patently frivolous.

(R. pp.40-41 (citations omitted).) The district court then considered Morris’s third claim of ineffective assistance of counsel, that trial counsel had promised he would be placed on probation and his cases transferred to mental health court, and determined that these claims, too, were contradicted by the record of the change of plea hearing. (R., pp.41-42.) Finally, the district court found that Morris’s claim that he was unable to meaningfully participate in the proceedings due to “the influence of mood stabilizing medications” was also contradicted by the record. (R., p.42.)

Concluding that it “again finds Petitioner’s claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel,” the district court denied Morris’s request for post-conviction counsel, and gave Morris an additional twenty (20) days to respond to avoid dismissal of his petition. (R., pp.42-43.) More than four months later, having received no response from Morris, the district court dismissed Morris’s petition for post-conviction relief. (R., pp.45-48.) Morris timely appealed. (R., pp.49-52.)

## ISSUE

Morris states the issue on appeal as:

Did the district court err when it denied Mr. Morris' motion for appointment of post-conviction counsel?

(Appellant's brief, p.4.)

The state wishes to rephrase the issue on appeal as:

Has Morris failed to show error in the denial of his motion for the appointment of post-conviction counsel?

## ARGUMENT

### Morris Has Failed to Show That the District Court Erred By Denying His Request For Post-Conviction Counsel

#### A. Introduction

On appeal, Morris challenges only the district court's conclusion that he did not raise the possibility of a valid claim with respect to his second claim, that counsel failed to object to the mental health evaluation being conducted by a counselor with the Department of Health and Welfare "and not a licensed physician." (Appellant's Brief, p.9.) Morris contends that the district court committed reversible error when it denied his motion for post-conviction counsel because, he claims, he raised the possibility of a valid claim that counsel should have objected to the mental health evaluation ordered pursuant to I.C. § 19-2524 on grounds that it did not comply with the requirements for a presentence psychological evaluation ordered pursuant to I.C. § 19-2522. (Appellant's Brief, pp.9-10.) Application of the law to the facts before the district court, however, supports its determination that Morris's petition and argument failed to establish even the possibility of a valid claim. Morris has therefore failed to show that the district court erred when it denied his motion for counsel.

#### B. Standard Of Review And Legal Standards Applicable To A District Court's Decision To Grant Or Deny A Request For The Appointment Of Counsel In Post-Conviction Proceedings

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v.

State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009).<sup>1</sup> The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with

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<sup>1</sup> Morris recognizes that the Idaho Supreme Court has repeatedly stated that the standard of review applicable to a district court's decision to grant or deny post-conviction counsel is one of an abuse of discretion. (Appellant's brief, p.6.) He argues, however, that "the 'possibility of a valid claim' standard that was coined in *Charboneau* and reiterated in *Swader* is a strictly legal standard that leaves no room for the district court to exercise its discretion" and, as such, "any decision by a district court to deny a post-conviction petitioner counsel must be reviewed *de novo* on appeal." (Id., pp.7-8 (citation omitted).) The state acknowledges that, despite the legislature's use of the word "may" in I.C. § 19-4904, see also 1993 Idaho Sess. Laws, ch. 265, § 2, p.898 (changing "shall" to "may"), the Idaho appellate courts have treated the standard for appointment of counsel as a pure question of law instead of discretion. See, e.g., Melton v. State, 148 Idaho 339, 343, 223 P.3d 281, 285 (2009) (district court's failure to rule on request for counsel did not necessitate reversal because the successive petition did not raise the possibility of a valid claim); Swader, 143 Idaho at 653, 152 P.3d at 14 (question when district court fails to apply the correct legal standard governing the request for appointed counsel is whether, applying the correct legal standard, the motion for appointment of counsel should have been granted); Judd v. State, 148 Idaho 22, 25, 218 P.3d 1, 4 (Ct. App. 2009) (citations omitted) (district court's utilization of incorrect legal standard to deny a request for post-conviction counsel does not necessitate reversal if, applying the correct standard, the request for counsel would properly be denied). The state submits, however, that whether the district court's decision in this case is reviewed for an abuse of discretion or *de novo*, the ultimate inquiry is still the same, i.e., whether Morris alleged facts showing the "possibility of valid claim."

the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007).

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 “permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, “[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001), quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111.

C. Morris Has Failed To Establish Reversible Error In The Denial Of His Request For Counsel To Pursue The Frivolous Claims Alleged In His Petition

Morris contended that counsel did not object to the mental health evaluation being administered by a counselor with the Department of Health and Welfare. (R., p.27.) After correctly noting that “[e]ffective legal representation does not require that an attorney object to admissible evidence,” State v. Aspeytia, 130 Idaho 12, 15, 936 P.2d 210, 213 (Ct. App. 1997), the district court

found that Morris “has neither alleged nor shown that the evaluation violated the requirements of I.C. § 19-2524 or similar provisions.” (R., p.41.) The district court also analogized this case to Thorgaard v. State, 125 Idaho 901, 905, 876 P.2d 599, 603 (Ct. App. 1994), where the “petitioner failed to show any error or inadequacy in the clinician’s report, thus failing to establish his burden of prejudice.” (R., p.41.) The district court’s ultimate conclusion that Morris’s contention did not raise the possibility of a valid claim is correct.

The mental health evaluation was ordered by the district court pursuant to I.C. § 19-2524. (See Supreme Court Case Nos. 35541 and 35542: “Mental Health Report Pursuant to Idaho Code Section 19-2524,” attached to Addendum to Presentence Report dated 7/14/2008; Sent. Tr., p.11, Ls.12-20; 6/19/08 Chg. Plea Tr., p.7, Ls.6-13, p.8, Ls.10-13, p.14, L.23 – p.15, L.4, p.21, Ls.5-8.<sup>2</sup>) I.C. § 19-2524 does not contain any explicit requirements for the qualifications of the persons conducting either the substance abuse assessment or mental health examination described therein; therefore a challenge to the clinician from the Department of Health and Welfare would be without any basis. The district court’s conclusion that Morris did not raise the possibility of a valid claim is therefore correct.

Morris appears to claim on appeal that I.C. § 19-2522 requires that a mental health evaluation conducted pursuant to I.C. § 19-2524 comply with the requirements for a psychological evaluation conducted pursuant to I.C. § 19-2522. (Appellant’s Brief, pp.9-10.) Because this conclusion is unsupported by

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<sup>2</sup> A Motion to Take Judicial Notice is being filed contemporaneously with this brief.

any argument or authority, Morris has waived this claim on appeal and the Court should decline to consider it. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). More importantly, nothing in either statute gives rise to the conclusion that the requirements for a psychological evaluation conducted pursuant to I.C. § 19-2522 should be applied to a mental health evaluation conducted pursuant to I.C. § 19-2524. To the contrary, the statutes make clear that an evaluation conducted pursuant to I.C. § 19-2524 is not subject to the more stringent requirements of I.C. § 19-2522.

First, I.C. § 19-2524 contains no explicit requirements for the qualifications of the persons conducting either the substance abuse assessment or mental health examination described therein. Second, I.C. § 19-2524(3)(b) provides that if, *after* receiving the ordered mental health evaluation, the court determines that it requires more information, the court may then order a *second* evaluation, this one “to be furnished by a psychiatrist, licensed physician or licensed psychologist.” Finally, the language of I.C. § 19-2524(6) at least implicitly indicates that the evaluations conducted pursuant to I.C. § 19-2524 may be conducted by the Department of Health and Welfare, as the costs of any assessments and examinations, “including any evaluation ... shall be borne by the department.” In sum, the language of I.C. § 19-2524 contains no explicit qualifications for the personnel conducting a mental health evaluation, and contains language implying that that an evaluation conducted by a psychiatrist, licensed physician or licensed psychologist is only required if the court orders

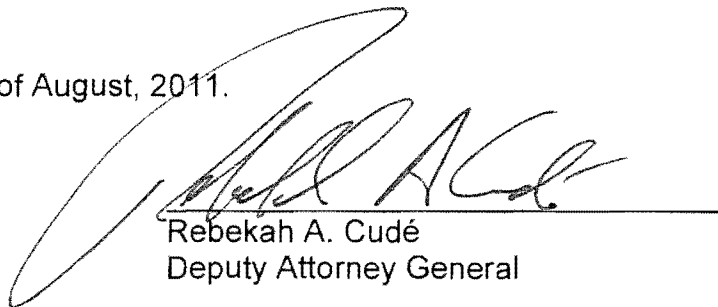
additional evaluation after having considered the mental health examination contemplated by I.C. § 19-2524.

Morris alleged no facts showing counsel performed deficiently for not objecting because the evaluation was by a clinician instead of a psychiatrist or psychologist. He likewise presented no evidence that an evaluation by a psychiatrist or psychologist instead of the clinician would have changed the outcome of sentencing. Morris has therefore failed to show that he raised the possibility of a valid claim of ineffective assistance of trial counsel that required the assistance of counsel in post-conviction proceedings. He has thus failed to show that the district court erred when it denied his motion for the appointment of counsel. This Court should affirm the district court's order summarily dismissing Morris's petition for post-conviction relief.

#### CONCLUSION

The state respectfully asks this Court to affirm the district court's summary dismissal of Morris's petition for post-conviction relief, including the district court's order denying Morris's motion for post-conviction counsel.

DATED this 24th day of August, 2011.



Rebekah A. Cudé  
Deputy Attorney General

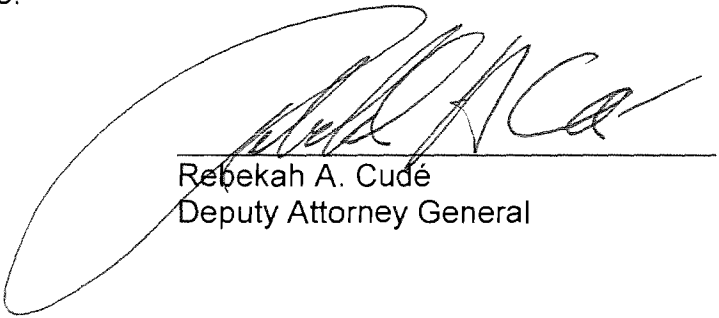


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24<sup>th</sup> day of August, 2011, I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SPENCER J. HAHN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defenders' basket located in the Idaho Supreme Court Clerk's office.



Rebekah A. Cudé  
Deputy Attorney General

RAC/pm